IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
OLLIE RICHARD TURNER,	)	**Case No. 01-11301**
DEBRA DAWN TURNER,	)	**Chapter 7**
	)	
Debtors.	)	
	)	
DEUTSCHE FINANCIAL SERVICES CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adversary No. 01-5218**
	)	
OLLIE RICHARD TURNER,	)	
	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This adversary proceeding came on for trial April 30, 2003 on plaintiff Deutsche Financial Services Corporation's complaint pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(4) and (a)(6)[1] to except from discharge a stipulated debt of $496,495 for which the defendant Ollie Richard Turner is liable pursuant to a state court judgment entered against Turner on a personal guaranty. Turner guaranteed Superior Housing, Inc.'s mobile home floor-plan financed by Deutsche. The stipulated debt represents the proceeds from Deutsche's collateral sold out of trust. In order to conceal the out of trust position, Turner perpetrated a mobile home "kiting" scheme, as described hereafter, over a nine month period

[1] All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq. unless otherwise specified.

before its collapse.

JURISDICTION

The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334. This adversary proceeding is a core proceeding under 28 U.S.C. § 157 (b)(2)(I).

FINDINGS OF FACT

Defendant Ollie Richard Turner ("Turner") was the president of Superior Housing, Inc. ("Superior"), a Wichita retail mobile home sales concern. Turner had been in the mobile home sales business for a number of years and founded Superior in 1984. He later bought out his partner and became the sole shareholder of Superior. Superior took over a lot at 2621 S. Broadway in 1987. This lot had been vacated by a failed mobile home dealer and contained a number of mobile and modular homes that had been repossessed by ITT Finance. At that time, Turner agreed to sell these homes for ITT. ITT then began to floor plan new mobile homes for Superior. According to Turner, ITT "became" Deutsche Financial Services Corporation ("Deutsche"), although there are no documents in the record to substantiate that. The parties have stipulated that Superior and Turner are bound by certain loan documents to ITT and the Court will assume that Deutsche succeeded ITT in some fashion.[2]

Under its agreement with Superior, Deutsche advanced the invoice price for each mobile home Superior acquired as inventory. Superior was to repay Deutsche the invoice price from the proceeds of each home sold and retain the difference between the invoice price and the sale price as profit on each sale. In addition, Superior was to pay monthly interest on the overall outstanding balance due Deutsche. Only two transaction documents were placed in evidence. One was an ITT security

[2] For purposes of this opinion, the Court refers to Deutsche and ITT interchangeably.

agreement providing that Superior would retain the proceeds of any inventory financed by Deutsche "in trust" and would remit said funds to Deutsche and not use them for any other purpose absent Deutsche's consent. The other document was Turner's unconditional personal guaranty of Superior's obligations to ITT and, in turn, to Deutsche. There is no floor plan agreement between Deutsche and Superior in the record before the Court.

Deutsche relies in part on an "Agreement for Wholesale Financing," a lengthy preprinted document addressed to "ITT Commercial Finance Corp." and executed in 1991 by Superior.[3] This Agreement generally provides that ITT may extend credit to Superior to acquire inventory and that Superior's debt will be secured by all inventory it maintains as well as other commercial collateral.[4] In pertinent part, paragraph 3 of the Agreement states:

> We [Superior] will hold all of the Collateral financed by you [ITT], and the proceeds thereof, *in trust for you* and we will immediately account for and remit directly to you all such proceeds when payment is required under the terms of our financing program with you.

[Emphasis added.] Turner testified that he understood that Superior held any proceeds from the sale of mobile homes in trust for Deutsche. The Agreement also provides that Superior will pay, upon sale thereof, the full amount of the balance due on each home financed by Deutsche. In the event Deutsche concludes that the balance of Superior's indebtedness exceeds the aggregate invoice price of the collateral on hand, Superior is obligated to repay Deutsche the difference between its indebtedness and the aggregate invoice price.[5] Turner testified that Superior did not segregate proceeds from the sale of Deutsche-financed mobile homes nor maintain a separate trust account for the Deutsche mobile

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[3] Exhibit A attached to Plaintiff's Trial Ex. 1.

[4] In addition to the mobile home inventory, Superior also granted to ITT a security interest in equipment, fixtures, accounts, contract rights, chattel paper, instruments, deposit accounts and general intangibles.

[5] Exhibit A, ¶ 8 attached to Plaintiff's Trial Ex. 1.

homes. Rather, all proceeds from the sale of mobile homes, by whomever financed, were deposited in Superior's general operating account.

Deutsche also relies on a personal guaranty given by Turner in 1991 which provides, in part:

> The undersigned [Turner] shall also indemnify, defend and hold you harmless of, from and against any and all (I) losses you sustain and expenses you may incur . . . which in any manner relate to, arise out of or are a consequence of any relations or transactions with Dealer [Superior] . . . If Dealer [Superior] fails to pay or perform any Liabilities to you when due, all Liabilities to you will then be deemed to have become immediately due and payable, and the undersigned [Turner] will then pay upon demand the full amount of all sums owed to you by Dealer . . . .[6]

By virtue of this instrument, Turner guaranteed repayment of all the Deutsche debt. The guaranty contains no "trust" language.

Superior enjoyed fairly substantial revenue until 1999. By that time, saturation of the mobile home dealer market forced the company to seek a different direction. By 1998, Superior had shifted the focus of the business and began doing what Turner referred to as "land/home" deals whereby Superior would not only sell mobile homes, but also tracts of land in developments on which the homes would be "set." Business improved significantly with this change. In a 12-month period in 1998 and 1999, Superior grossed some $8.7 million in sales revenue. Unfortunately, because of a variety of internal problems at Superior, the company netted a mere $49,000 in profit on these sales. When in the following six months, the company only grossed $2.2 million, the profits disappeared entirely.

Turner described himself as being primarily a salesman and not a manager. Because of the growing volume of sales and his personal attention to the land development aspect of the business, he entrusted and delegated more of the sales business to lot managers, several of whom did not serve

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[6] Exhibit O attached to Plaintiff's Trial Ex. 1.

Superior well. Because of Superior's employee incentive system, which paid commissions on gross sales rather than net income and because some mobile home manufacturers paid bonuses directly to salespeople for sales of their products, Turner's managers made numerous unprofitable deals. It was not unusual for these managers to take in trade for a new home, a used home encumbered with debt in excess of its value.

Turner, who is 50 years old, has a high school education and limited financial skills.[7] He relied to some extent on his secretary/bookkeeper, Ruth Bassett, to keep him abreast of the business' condition. This she apparently was unable to do. Ruth did not prepare and Turner was not provided with monthly financial or operating reports. At best, Turner was familiar with Superior's day-to-day cash position and whether there were sufficient funds in the bank account to issue checks.

By August of 1999, Turner became aware of Superior's weakening cash position and, by his own admission, began to divert the proceeds of Deutsche-financed mobile homes to the payment of ordinary operating expenses.[8] As he testified at trial, when Deutsche would send floor plan inspectors to the dealership (which they did every 30 to 45 days), and when the inspectors would detect that a mobile home was missing and unaccounted for, Superior would supply Deutsche with a check. The source of the check would be the proceeds of some other mobile home that had been sold. While the record is murky on this point, the checks would be presented by Turner or by Ruth and accepted by Deutsche, who assumed that they represented the proceeds of "missing" homes.[9] According to

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[7] In the year prior to Turner's bankruptcy, he received wages of $63,000 from Superior.

[8] Turner stipulated in the Final Pretrial Conference Order, that the sale and diversion of Deutsche's collateral proceeds began in the summer of 1999. Dkt. 17.

[9] Turner testified at trial that he made no affirmative misrepresentation concerning the source of the funds for the checks tendered to Deutsche. Deutsche's witness was unable to recollect any specific, affirmative representation regarding either the mobile home units in question or the source of the funds for the checks tendered. In fact, Deutsche's witness Dubois did not recount any conversation that he may have had with Turner.

Deutsche, by employing this "device," Turner diverted the proceeds of 7 mobile homes, or $496,495, to the payment of Superior's operating expenses and to Deutsche's detriment. Turner also managed to foster for some nine months Deutsche's ultimately false sense of security concerning its collateral base.

Turner's trial testimony reaffirmed the stipulations contained in the Final Pretrial Conference Order[10] that *he* sold Deutsche collateral and used sale proceeds of $496,495 to pay Superior's operating expenses.[11] He also stipulated that *he intentionally* concealed from Deutsche the fact that these mobile home units had been sold out of trust. Turner testified at trial that he hid the out of trust situation from Deutsche to keep his business; he knew that Deutsche would shut him down if it found out that Superior was out of trust.

Kyle Dubois, a Deutsche floor plan inspector, testified that his inspection regime was as follows. He would appear at the dealership to conduct a physical count about every 45 days. He would bring with him a downloaded computer inventory sheet which was, according to him, updated by the central floor plan accounting facility of Deutsche the night before. If units were missing, he would inquire of Turner or Ruth Bassett. If he was told that the unit had been sold, he would then determine whether the unit had been sold for cash payable to the dealer or if it was under a pending contract. If the unit was reported sold on a pending contract, Dubois or the account manager would independently verify the status of the contract with the buyer or the third-party lender. If a unit was sold and its proceeds unpaid, it would be denominated "sold and unpaid" or "SAU."

Dubois was candid in his testimony that he did not recall receiving a check from Turner at any

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[10] Dkt. 17.

[11] The parties did not by stipulation reveal to the Court the manner in which the amount of $496,495 unaccounted-for proceeds was calculated. Thus, the Court is unable to determine on its own neither the mobile homes that comprise the $496,495 nor the amount of proceeds attributable to any particular mobile home.

time and that he could not remember Turner making any representations to him concerning the mobile homes or the checks. And, Dubois was clear that Turner never told him about any of the missing units being "sold and unpaid." Dubois testified that, had he known, he would have reported to his supervisors that Superior had spent mobile home sale proceeds on operating expenses.

Deutsche offered into evidence a summary of inspection reports[12] along with specific periodic inspection reports for the period December 1998 to April 2000.[13] According to Dubois, there are seven mobile homes unaccounted for and are known by the last four digits of their serial numbers as: 0543, 0542, 0570, 0414, 0423, 2300, and 2460.

Each of the inspection reports contained the following certification by Superior's agents to Deutsche:

> I have personally seen and checked the Serial numbers on the merchandise listed above and certify that the information I have given is true and accurate in all respects.

Turner signed the foregoing certification for two of the inspections – October 26, 1999 and January 17, 2000.[14] All other inspection certifications before the Court were signed by Ruth Bassett. Deutsche did not attempt to present any evidence tying the missing mobile home proceeds to the October or January inspections to establish that Turner's written certifications thereon were false at the time they were made and the Court is unable to do so independently from the exhibits before it. According to the October 26 inspection report, units 0414 and 2300 were present on the lot and a contract was pending on unit 0423.[15] According to the January 17 inspection report, units 0414 and

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[12] Plaintiff's Trial Ex. 6.

[13] Plaintiff's Trial Ex. 7-19.

[14] Plaintiff's Trial Ex. 15 and 17.

[15] Plaintiff's Trial Ex. 15.

0542 were accounted for on the lot, unit 0570 was in dispute,[16] unit 0423 was sold and unpaid, and unit 2300 had a contract pending.[17] Unit 0423 was potentially out of trust as of January 17, but according to the next month's inspection, unit 0423 went back to "contract pending" status.[18] At best, Turner's certifications in October and January were made at a time when he admittedly was out of trust with Deutsche.[19] Deutsche did not present testimony to establish when each of the seven mobile homes first became out of trust nor when each of the seven mobile homes were sold and became "sold and unpaid."

Based upon Deutsche's summary and inspection reports, however, it appears to the Court that five of the missing homes (all but 0423 and 2300) were first shown as sold and unpaid on the April 9, 2000 floor check.[20] The summary indicates that the dealer (presumably Turner) was absent for this floor check. Per the summary, Turner promised to send checks to cover their proceeds on April 12, and in one case, on April 17. It appears that no checks were sent, however, and after Deutsche had made further inquiry and investigation after the April 9 floor check, each of these homes reappears on

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[16] Unit 0570 was coded as "DIS," and extrapolating from the status codes and descriptions on Ex. 6, this code apparently meant "dispute" and usually referred to a unit that was still at the factory and had not been delivered or was in transit from the factory to the dealer. This status also appears to be supported by Ex. 17 which reflects that Deutsche had just recently funded unit 0570 earlier in the month.

[17] Plaintiff's Trial Ex. 17.

[18] Plaintiff's Trial Ex. 18.

[19] Turner testified that he first became out of trust in the summer of 1999.

[20] The homes numbered 0423 and 2300 were actually delivered to building sites and were ready to set. They were carried on Deutsche's inspection reports as contracts pending as early as August 1999. According to Turner, when Superior's bankruptcy hit, the purchasers failed to make full payment for the mobile home and a portion of the proceeds were never received by Superior. Both homes continued to be shown as "contract pending" as of May 1.

the summary as of May 1, 2000.[21] This is consistent with the testimony at trial that Deutsche discovered the problem in the April 2000 time frame when Turner was no longer able to issue checks to cover the missing homes and he "came clean." Notwithstanding the discrepancies in the documentary evidence, Turner did not dispute the fact that these seven homes were sold out of trust and that Deutsche never received the proceeds thereof.

Turner specifically admitted that his company first got out of trust with Deutsche in the summer of 1999.[22] He was initially able to cover these deficits with the proceeds of other mobile homes sold, but eventually became too extended to continue this practice. He also admitted on cross examination that he used the funds obtained via this deception to operate the business, even though he understood that the funds were not his to use. Turner also admitted that it was he who directly controlled the funds of Superior, that he directed that checks be prepared to present to Deutsche, and that he made the series of decisions culminating in the sale of the seven homes out of trust. He stated that when Deutsche's floor plan checkers requested funds during inspections, he would tender the checks as requested, but without making specific representations concerning the source of those proceeds. Turner admitted that he did not tell Deutsche that he had already spent the proceeds for the missing units.

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[21] From the Court's independent review of Exhibit 6, this does not appear to be the case for home 2460. According to the summary, home 2460 was listed as "sold and unpaid" on the April 9 floor check. The far right column for the April 9 listing reflects that Deutsche received payment for home 2460 on April 14, 2000 and it was no longer shown as "open." Home 2460 was not carried over to the summary as of May 1, 2000. The Court cannot reconcile Exhibit 6 with Deutsche's contention and the parties' agreement that proceeds from home 2460 were never received by Deutsche.

In addition, Exhibit 6 shows home 0414 as sold and unpaid as of the April 9 floor check but it was subsequently carried over to May 1 as a contract pending and "open." Thus, it is unclear whether home 0414 was in fact ever sold.

[22] No testimony was presented that Superior was out of trust at this time with respect to any of the seven mobile homes at issue.

Turner concedes that he knew his actions were wrong and morally reprehensible. He argues however that he always intended and believed that he could get Deutsche paid back. Turner believed that there were sufficient other assets to pay the Deutsche debt in full. In February 2000, Turner retained an accounting consultant, Marlyn Potter, who advised him to institute various accounting systems and internal controls to gain a hold on his business interests. The errant sales managers left the company. Turner and Potter also attempted to get a loan of approximately $500,000 from local lenders and from Fuqua Homes, a factory with which Superior traded, to repay the out of trust homes, but no loans were forthcoming. Turner also loaned to Superior, prior to its bankruptcy, approximately $112,000 of his own money, including $30,000 in March of 2000.[23]

On May 5, 2000, after Deutsche learned of Superior's out of trust situation, it began state court foreclosure proceedings against Superior and Turner, triggering Superior's chapter 11 bankruptcy. Superior's reorganization case was ultimately converted to a liquidation under chapter 7. On September 26, 2000 judgment in the state court action was entered against Turner in the principal amount of $1,590,925.18, of which $496,495 constituted proceeds from out of trust mobile homes diverted to Superior's operating expenses.[24] When Deutsche attempted to collect its judgment, Turner and his wife filed this chapter 7 case.[25] Deutsche, in turn, timely filed this adversary proceeding to determine the dischargeability of Turner's $496,495 debt.

ANALYSIS

Deutsche seeks to except its debt from Turner's discharge on three separate statutory grounds:

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[23] Superior filed for bankruptcy relief on May 11, 2000 as Case No. 00-11760.

[24] Plaintiff's Trial Ex. 2. Of the judgment amount, the parties stipulated that $496,495 constituted trust funds from the sale of Deutsche-financed mobile homes and were used to pay Superior operating expenses. *See* Dkt. 17, Stipulation ¶ C.

[25] Turner filed chapter 7 bankruptcy on March 29, 2001. Dkt. 17.

(1) obtaining money by false pretenses, false statements or actual fraud under §523(a)(2)(A); (2) obtaining money by fraud while acting in a fiduciary capacity under § 523(a)(4); and (3) the willful and malicious damage of Deutsche's property interests under § 523(a)(6). Turner argues that while his conduct was admittedly wrong, none of his actions is legally actionable under any of these sections of the discharge statute. His admissions at trial and his pretrial conference order stipulations that: (1) he sold Deutsche's collateral and diverted $496,495 in proceeds; and (2) he "intentionally concealed from" Deutsche that its collateral had been sold out of trust, belie this position.

As the creditor seeking to except Turner's debt from discharge, Deutsche has the burden of proof. A preponderance of the evidence standard applies to all § 523(a) dischargeability exceptions.[26] Dischargeability exceptions are construed narrowly and any doubt is resolved in debtor's favor.[27]

Section 523(a)(2)(A)

Turner defends against the § 523(a)(2)(A) claim on two fronts. One, he argues that there was no fraud in the inception of the debt in 1991 when he signed the guaranty. Two, he argues that he made no fraudulent representation to Deutsche, apparently contending that his omissions and nondisclosures are not actual fraud.

Section 523(a)(2)(A) provides, in pertinent part:

> A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt – . . . (2) for money, property, services, . . . obtained by – (A) *false pretenses, a false representation, or actual fraud . . .*

To prevail on this fraud discharge exception, Deutsche must show that: (1) Turner made a false representation; (2) Turner had the intent to deceive Deutsche; (3) Deutsched relied on Turner's

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[26] *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991); *Merrill v. Merrill (In re Merrill)*, 252 B.R. 497, 504 (10th Cir. BAP 2000).

[27] *Merrill, supra* at 504.

conduct; (4) Deutsche's reliance was justifiable[28]; and (5) Deutsche was damaged as a result.[29]

Turner's argument that there was no fraud in the inception of the debt (*i.e.* when he signed the guaranty in 1991), does not insulate him from the consequences of his admitted 9 month deception (August 1999 to April 2000) of Deutsche. The "debt" at issue here is the state court judgment entered against Turner in September 2000. The parties have stipulated that $496,495 of the unpaid judgment constitutes proceeds of Deutsche's collateral sold out of trust. Thus, if Turner engaged in fraud in selling mobile homes out of trust, the "debt" is for property or money obtained by fraud.

Turner's other argument, that he made no false representation, is equally unavailing. A "false representation" is but one species of fraud actionable under § 523(a)(2)(A). The statute on its face also lists "false pretenses" and "actual fraud." In *Field v. Mans*[30] the Supreme Court stated that the terms "false pretenses," "false representation," and "actual fraud" used in § 523(a)(2)(A) are terms of art that are to be afforded their meaning developed at common law. At common law, omissions and nondisclosures constitute actual fraud.[31] This Circuit has also recognized that omissions and nondisclosures may provide the basis for a § 523(a)(2)(A) discharge exception.[32]

Thus, the fact that Turner made no direct affirmative misrepresentation to DuBois or Deutsche, does not protect him. Turner concedes that he did not disclose to Deutsche that he was out of trust or

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[28] As a result of the Supreme Court decision *Field v. Mans*, 516 U.S. 59, 116 S.Ct. 437, 133 L.Ed. 2d 351 (1995), the creditor's reliance must be justifiable, but not necessarily reasonable. Thus, the justifiable reliance element is a subjective standard and less demanding than reasonable reliance.

[29] *Groetken v. Davis (In re Davis)*, 246 B.R. 646, 652 (10th Cir. BAP 2000).

[30] 516 U.S. 59, 68-69, 116 S. Ct. 437, 133 L.Ed. 2d 351 (1995). *See also, Chevy Chase Bank FSB v. Kukuk (In re Kukuk)*, 225 B.R. 778 (10th Cir. BAP 1998) (considering whether "false representation" under § 523(a)(2)(A) may be based upon an implied representation).

[31] RESTATEMENT (SECOND) OF TORTS § 551. *See also, In re Apte*, 96 F.3d 1319 (9th Cir. 1996).

[32] *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373-75 (10th Cir. 1996) (Failure to disclose and omissions by debtor were characterized as "false representations" under § 523(a)(2)(A).). *See also, In re Diel*, 277 B.R. 778 (Bankr. D. Kan. 2002).

that he had spent the proceeds on Superior operating expenses rather than paying Deutsche. He admits that he "intentionally concealed" the out of trust situation from Deutsche. Turner engaged in the artifice of "kiting" mobile homes in order to carry out his deception of Deutsche. Deutsche's reliance on Turner's nondisclosure of the true state of affairs was justifiable.[33] Finally, the parties stipulated that Deutsche was damaged to the tune of $496,495 as a result of the out of trust sales. While Superior was the main benefactor of Turner's fraud, Turner's actions and concealment as Superior's president were the instrument of that fraud. His actions, along with the terms of the guaranty and the state court judgment, render him liable to Deutsche for the stipulated debt. Given Turner's intentional concealment and his numerous admissions of wrongdoing, the Court is hard put to find anything other than actual fraud in Turner's actions. Deutsche has proven by a preponderance of the evidence that Turner engaged in actual fraud.

And while not pressed by Deutsche at trial, the circumstances described in the record further point to a debt for property obtained by false pretenses. The term "false pretenses" encompasses conduct intended to create or foster a false impression.[34] Here, the false impression created by Turner's "kiting" scheme was that Superior was properly remitting to Deutsche the proceeds from sales of mobile home. His admitted and stipulated intentional concealment of Superior's out of trust situation caused Deutsche to believe that its collateral base was secure. As noted above, all of the other elements of § 523(a)(2)(A) are present as well. Deutsche has proven by a preponderance of the evidence that Turner obtained property by false pretenses.

In conclusion, the Court strenuously disagrees with Turner's contention that the circumstances

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[33] Deutsche's reliance was justified, particularly when viewed subjectively. Deutsche had floor-planned Superior for eight years, apparently without any problems or difficulties concerning its collateral. Moreover, the prompt action that Deutsche did take upon learning that Superior was out of trust – commencing its lawsuit in less than thirty days – buttresses the justifiable reliance element.

[34] *See Bombardier Capital, Inc. v. Baietti (In re Baietti),* 189 B.R. 549, 554 (Bankr. D. Me. 1995).

of this case do not squarely "fit" into § 523(a)(2)(A). In this Court's view, the case is a perfect fit to except Turner's debt from discharge; § 523(a)(2)(A) is the discharge exception frequently applied to debtors whom are out of trust on floor-plans.[35]

Section 523(a)(4)

Deutsche's assertions of fiduciary fraud are far less persuasive. The requisite fiduciary relationship for purposes of § 523(a)(4) was discussed in *Fowler Bros. v. Young (In re Young).*[36]

> Under this circuit's federal bankruptcy case law, to find that a fiduciary relationship existed under § 523(a)(4), the court must find that the money or property on which the debt at issue was based was entrusted to the debtor. . . . an express or technical trust must be present for a fiduciary relationship to exist . . . .

Deutsche notes the language of the security agreement providing that *Superior* agrees to hold the proceeds from mobile homes *in trust for* Deutsche. The Court notes that similar language is lacking in the guaranty signed by Turner. Even if this Court were to conclude that the security agreement binds Turner, the Court is not persuaded that this language, in and of itself, is sufficient to establish an express or technical trust between Deutsche and Turner.[37] No trust account or other means of segregating Deutsche's proceeds was in place and apparently, none was required by Deutsche.[38]

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[35] *See e.g. Conseco v. Howard (In re Howard),* 261 B.R. 513 (Bankr. M.D. Fla. 2001) (actual fraud regarding floor planned mobile home inventory); *Bombardier Capital, Inc. v. Baietti (In re Baietti),* 189 B.R. 549 (Bankr. D. Me. 1995) (false pretenses regarding floor planned boat inventory); *Universal Pontiac-Buick-GMC Truck Inc. v. Routson (In re Routson),* 160 B.R. 595 (Bankr. D. Minn. 1993) (fraud regarding car dealership floor plan); *Ford Motor Credit Company v. Marinko (In re Marinko),* 148 B.R. 846 (Bankr. N.D. Ohio 1992) (fraud regarding floor planned tractor and equipment dealership).

[36] 91 F.3d 1367, 1371 (10th Cir. 1996).

[37] *See Ford Motor Credit Company v. Talcott (In re Talcott),* 29 B.R. 874 (Bankr. D. Kan. 1983) (Fact that document has language purporting to create a trust is inconclusive; substance controls over form.).

[38] *See Holaday v. Seay (In re Seay),* 215 B.R. 780, 787 (10th Cir. BAP 1997) (In order to establish an express or technical trust, there must be an identifiable trust *res*.).

In *Ford Motor Credit Company v. Talcott (In re Talcott),*[39] a bankruptcy court from this District concluded that a floor plan financing arrangement where the lender, via trust receipts, purported to reserve title until the inventory was paid for, did not create an express or technical trust. As in the instant case, the dealer was obligated to account for and deliver proceeds from the sale of inventory to the lender but the agreement and the parties' relationship lacked the typical attributes of a trust.

> Courts will find the requisite express or technical trust when a state statute defines the relationship as a trust, when the relationship has the typical attributes of a trust or when the contract expressly creates a trust. In Kansas there is no statute defining a floor plan financing arrangement as a trust.[40]

The court in *Talcott*, citing to the Supreme Court's decision in *Davis v. Aetna Acceptance Co.*[41] concluded that the substance of the transaction was that the lender merely took a security interest in the dealer's inventory. This Court agrees.[42] Deutsche and Superior (and Turner) stood in a creditor-debtor relationship.

Were this Court to conclude otherwise, nearly every floor plan financing arrangement and commercial credit transaction would be transformed into a trust or fiduciary relationship. The Court

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[39] 29 B.R. 874 (Bankr. D. Kan. 1983).

[40] *Id.* at 878.

[41] 293 U.S. 328, 55 S.Ct. 151, 79 L.Ed. 393 (1934) (Former section 17, predecessor of section 523(a)(4) speaks to technical trusts, not those which the law implies from the contract).

[42] The Court is cognizant of some limited authority finding that a floor plan arrangement creates a technical trust and fiduciary relationship. *See In re Marinko*, 148 B.R. 846 (Bankr. N.D. Ohio 1992). The better view, and the weight of prevailing authority, is that it does not. *See Bombardier Credit, Inc. v. Theis (In re Theis),* 109 B.R. 474 (Bankr. M.D. Fla. 1989) (A security agreement containing language to assure the dealer's performance of its obligation under a floor plan does not create a technical or express trust.); *Ford Motor Credit Company v. Gallaudet (In re Gallaudet),* 46 B.R. 918 (Bankr. D. Vt. 1985) (There is no fiduciary trust relationship where debtor is not required to segregate proceeds received from the sale of floor-planned vehicles and deposit them in a special account for the benefit of the lender.).

cannot construe the discharge exception so liberally in favor of the creditor.[43] Deutsche has not established the requisite fiduciary relationship to except Turner's debt from discharge under §523(a)(4).

Section 523(a)(6)

The remaining discharge exception invoked by Deutsche is the "willful and malicious injury" exception. The Supreme Court case *Kawaauhau v. Geiger*[44] is the seminal case concerning the appropriate standard for a willful and malicious injury. To render a debt nondischargeable under § 523(a)(6) an intentional *injury* is required, not merely an intentional *act* that leads to injury.[45] Thus, to demonstrate that Turner willfully and maliciously injured Deutsche or its property, Deutsche had to establish that when the acts were committed, Turner harbored the intention of injuring Deutsche. In *Mitsubishi Motors Credit of America, Inc. v. Longley (In re Longley)*[46] the Tenth Circuit Bankruptcy Appellate Panel held that the requisite intent may be shown indirectly by evidence that the debtor knew of the creditor's lien rights and that the debtor knew his conduct would cause injury. This Court's reading of *Geiger* and *Longley* does suggest, as Turner argues, that this is a subjective test.[47]

The Court is not convinced that Turner harbored this intent. While Turner acknowledged that

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[43] *Merrill v. Merrill (In re Merrill)*, 252 B.R. 497, 504 (10th Cir. BAP 2000) (Dischargeability exceptions are construed narrowly and doubt is resolved in debtor's favor).

[44] 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed. 2d 90 (1998).

[45] *See also, Watson v. Parker (In re Parker)*, 264 B.R. 685, 700 (10th Cir. BAP 2001)

[46] 235 B.R. 651, 657 (10th Cir. BAP 1999).

[47] The willful injury standard is not satisfied by a "reasonably forseeable injury" that results from a debtor's intentional act. *Via Christi Regional Medical Center v. Budig (In re Budig)*, 240 B.R. 397, 400 (D. Kan. 1999). *See also, Via Christi Regional Medical Center v. Englehart (In re Englehart)*, 229 F.3d 1163, 2000 WL 1275614 (10th Cir. 2000) (The willful injury exception turns on the debtor's state of mind; the debtor must have wished to cause injury or at least believed it was substantially certain to occur); *Mayfield Grain Co., Inc. v. Crump (In re Crump)*, 247 B.R. 1 (Bankr. W.D. Ky. 2000) (applying subjective standard); *Conseco v. Howard (In re Howard)*, 261 B.R. 513, 521-522 (Bankr. M.D. Fla. 2001).

he understood that the proceeds were not his to spend, that he knew of Deutsche's rights to the proceeds, and that it was "wrong" to divert the proceeds to Superior's operating expenses, the Court is lacking evidence that Turner knew his diversion of proceeds would cause injury to Deutsche. He injected his own money into this enterprise during the time he was diverting Deutsche proceeds into Superior's operations.[48] Turner had taken steps to rectify Superior's poor accounting systems and internal controls in order to turn the company around. With the exception of the payment of his salary and prolonging Superior's ultimate demise, he did not directly benefit from the diversion of proceeds. While Turner's belief that he could turn the business around and get Deutsche repaid may have been misguided and even unrealistic in hindsight, Turner did strike this Court as quite credible but lacking financial sophistication despite his years in the mobile home business. Accordingly, the Court simply cannot find that Turner knew his actions would injure Deutsche or that Turner believed that injury to Deutsche was substantially certain.[49]

In short, while this case presents a close question, the Court is required to resolve its doubts in Turner's favor.[50] Absent sufficient proof of a willful injury, Turner's debt is not excepted from discharge under § 523(a)(6).[51]

CONCLUSION

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[48] He loaned a total of $112,000 to Superior, including $30,000 as late as March 2000.

[49] *See Budig, supra* at 400-01.

[50] *See Merrill, supra* at 504.

[51] As noted in *Longley*, cases decided after *Geiger* have struggled with whether the "willful and malicious injury" standard is a single standard requiring proof of an intentional injury or requires a separate inquiry or proof of a "malicious injury." 235 B.R. at 656 n. 5. At least one bankruptcy court from this District has concluded that there is no distinction between a "willful injury" and a "malicious injury." *See CSC Holdings, Inc. v. Feiner (In re Feiner),* 254 B.R. 266, 269 (Bankr. D. Kan. 2000).

The record is unclear,[52] and disputed by Turner, as to what amount of the stipulated debt of $496,495 is currently due Deutsche. The Sedgwick County District Court entered judgment against Turner in the amount of $1,590,925.18 but apparently, some portion of that judgment has been subsequently satisfied and reduced by liquidation of Superior's assets. This Court defers to the state court to determine the extent of Turner's remaining debt to Deutsche, but finds that said debt in an amount not to exceed $496,495 shall be excepted from discharge for false pretenses and actual fraud under § 523(a)(2)(A).

Dated this 30th day of May, 2003.

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ROBERT E. NUGENT
CHIEF BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the **Memorandum Opinion** was deposited in the United States mail, postage prepaid on this 30th day of May, 2003, to the following:

Mark J. Lazzo
Mark J. Lazzo, P.A.
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[52] While Deutsche represented to the Court in its opening statement that some amounts had been credited against the stipulated debt of $496,495, it presented no evidence to the Court to establish what portion of the stipulated debt and the state court judgment remains unpaid.

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_____
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